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80-2194

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CROATAN BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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QUESTION PRESENTED FOR REVIEW

Whether a jury forced to view allegedly obscene films two or three at a time can properly apply the test for obscenity and evaluate each film "as a whole?"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINIONS DELIVERED BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	3
A Jury Forced to View Two or Three Films at a Time Cannot Evaluate Each Film in Conformity with the Constitutional Test for Obscenity	3
APPENDIX	1a

TABLE OF CASES

	Page
Bourland v. *State*, 502 S.W. 2d 8 (Tex. Crim. App. 1973)	5
Bryers v. *State*, 480 S.W. 2d 712 (Tex. Crim. App. 1972)	5
Cambist Films, Inc. v. *Duggan*, 298 F. Supp. 1148 (W.D. Pa.), *rev'd on other grounds*, 420 F.2d 687 (3d Cir. 1969)	4
Haldeman v. *United States*, 340 F.2d 59 (10th Cir. 1965)	5
Hanley v. *State*, 479 F.2d 486 (Alaska 1970)	4
Hosey v. *City of Jackson*, 309 F. Supp. 527 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971)	4
In re Louisiana News Co., 187 F. Supp. 241 (E.D. La. 1960)	4
McKinney v. *Tuscaloosa*, 268 So. 2d 488 (Ala. 1972)	5
Miller v. *California*, 413 U.S. 15 (1973)	*passim*
People v. *New Horizons, Inc.*, —— Colo. ——, 616 P.2d 106 (Colo. 1980)	4
Playboy Publications, Inc. v. *McAuliffe*, 610 F.2d 1354 (5th Cir.), *cert. dismissed*, —— U.S. ——, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980)	4
Regina v. *Hicklin*, L.R. 3, Q.B. 360 (1868)	6
Roth v. *United States*, 354 U.S. 476 (1957)	3, 6
United States v. *Tupler*, 564 F.2d 1294 (9th Cir. 1977)	4
United States v. *West Coast News Co.*, 228 F. Supp. 171 (W.D. Mich. 1964), *aff'd* 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub nom. Aday* v. *United States*, 388 U.S. 447 (1967)	5
Zenith International Film Corp. v. *City of Chicago*, 291 F.2d 785 (7th Cir. 1961)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

CROATAN BOOKS, INC.,[1]
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.[2]

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

OPINIONS DELIVERED BELOW

The judgment of the Circuit Court of Fairfax County appears in the appendix hereto. The order of the Virginia Supreme Court, dated April 27, 1981, declining to issue a writ of certiorari to the Circuit Court of Fairfax appears in the appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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[1] Statement pursuant to Rule 28.1 of the Rules of the United States Supreme Court, as amended October 21, 1980: Counsel in this case have been advised that Croatan Books, Inc., has no present corporation, no subsidiary corporations, and no affiliates.

[2] Caption lists all parties.

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The first amendment to the United States Constitution, which provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

STATEMENT OF THE CASE

Petitioner Croatan Books, Inc., is engaged in the sale and rental of sexually oriented films, books and magazines at a store located in Fairfax County, Virginia. The indictment in this case charged Croatan with possessing with intent to rent ten allegedly obscene films. The films in question were "shorts" designed to be viewed by customers individually in private projection booths. The offenses were charged as felonies under the provisions of a Virginia repeat offenders statute.

Prior to trial Croatan entered pleas of guilty as to two of the ten films. The remaining counts were tried before a twelve-member jury in the Circuit Court of Fairfax County. The trial judge adopted, over Croatan's objections, a procedure he had imposed previously in a similar trial involving the same defendant. Three separate projectors were set up and the films screened *simultaneously* on a blank wall in groups of three, three and two. The jury ultimately returned verdicts of guilty on all eight films and recommended the maximum fine of $1,000 per film. On August 8, 1980, the court entered judgment and imposed the penalty recommended by the jury.

REASONS FOR ALLOWING THE WRIT

A Jury Forced to View Two or Three Films at a Time Cannot Evaluate Each Film in Conformity with the Constitutional Test for Obscenity

The question presented is a persistent one, the same as that recently raised in another case before this Court and involving the same parties, *Croatan Books, Inc.* v. *Commonwealth of Virginia, cert. denied,* June 22, 1981 (No. 80-1601). The recurrent use of a trial procedure violative of basic constitutional principles underscores the need for review by this Court. In this case the sole contested issue at trial was whether the eight films appealed to a "prurient interest" in sex. Croatan introduced the extensive expert testimony of Dr. Lawrence Donner, a psychologist specializing in the study of sexual behavior and associate professor of clinical psychology at the University of Maryland School of Medicine. Dr. Donner testified that in his opinion none of the films appealed to a "prurient," i.e., a sick, morbid or shameful interest in sex, but rather appealed to a normal and healthy erotic interest in sex. Croatan also presented the testimony of two experts who together conducted a survey of community attitudes towards sex and sexually explicit materials. The Commonwealth offered the testimony of lay witnesses from the community.

In determining whether the dominant theme or purpose of a film is an appeal to the prurient interest, a jury must consider the film as a whole and not base its judgment on isolated portions or scenes. *Miller* v. *California,* 413 U.S. 15, 24 (1973). In the landmark case of *Roth* v. *United States,* 354 U.S. 476, 489 (1957), this Court disposed of the notion that obscenity can be judged on the basis of isolated excerpts and held that the determination of obscenity must proceed from a considera-

tion of the material "taken as a whole." The current standard for obscenity, the so-called "*Miller* test," examines

> (a) whether "the average person, applying contemporary community standards" would find that the work, *taken as a whole*, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work *taken as a whole*, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (emphasis added).

An isolated segment of a film, book or magazine cannot constitutionally provide either probable cause for an obscenity arrest [3] or the foundation for an obscenity conviction.[4] When the obscenity of a motion picture is in issue, the factfinder must view the entire film in order

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[3] *See United States* v. *Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977); *Hosey* v. *City of Jackson*, 309 F. Supp. 527, 534 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971); *Cambist Films, Inc.* v. *Duggan*, 298 F. Supp. 1148, 1152 (W.D. Pa.), *rev'd on other grounds*, 420 F.2d 687 (3d Cir. 1969); *Hanley* v. *State*, 479 P.2d 486, 493 (Alaska 1970).

[4] *See, e.g., Playboy Publications, Inc.* v. *McAuliffe*, 610 F.2d 1354, 1369 (5th Cir.), cert. dismissed, —— U.S. ——, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980) (while certain parts of a magazine if considered separately would be obscene, the magazine may turn out to be not obscene when considered as a whole); *In re Louisiana News Co.*, 187 F. Supp. 241, 246 (E.D. La. 1960) (one objectionable picture cannot render entire publication obscene); *People* v. *New Horizons, Inc.*, —— Colo. ——, 616 P.2d 106 (Colo. 1980) (statute unconstitutional which would allow magazine consisting of words and pictures to be declared obscene on the basis of the pictures alone without reference to text or accompanying articles).

to make a proper determination.[5] Failure to do so must vitiate the finding of obscenity.[6]

In this case, Croatan focused its entire argument upon the first prong of the *Miller* test, seeking to establish in the minds of the jury a determination between material which appeals to a "prurient" interest in sex and that which appeals merely to the perfectly normal, healthy erotic interest in sex. That is a discrimination subtle enough to challenge a jury's determination even in the best of circumstances. It is too much to expect that any jury confronted with up to *three films* projected *simultaneously* upon the courtroom wall can somehow perceive each "as a whole," fix each in mind and memory, and then accurately sort through the afternoon's jumble of cinematic impressions in order to separate the obscene from the protected.

The simultaneous screening forced the jurors to turn from film to film, able to concentrate on only a portion of each at a time or perhaps, when attention waned, to let vision fall passively upon some of the three. Whatever the case, it is plain that no juror could have viewed all of every film, and therefore none could judge each film as a whole.

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[5] *See Haldeman* v. *United States*, 340 F.2d 59, 62 (10th Cir. 1965); *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (7th Cir. 1961); *United States* v. *West Coast News Co.*, 228 F. Supp. 171, 178 (W.D. Mich. 1964), *aff'd*, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub nom. Aday* v. *United States*, 388 U.S. 447 (1967); *Bourland* v. *State*, 502 S.W. 2d 8, 9 (Tex. Crim. App. 1973); *Bryers* v. *State*, 480 S.W. 2d 712, 717-19 (Tex. Crim. App. 1972); *McKinney* v. *Tuscaloosa*, 268 So. 2d 488, 492 (Ala. 1972).

[6] For example, in *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (9th Cir. 1961), the court overturned an obscenity conviction where the factfinder "failed to view the film as a whole and thus could under no circumstances apply the proper standard of obscenity."

In light of *Roth* and *Miller*, there is simply no alternative to viewing each film in its entirety and judging each as an integral whole. The procedure adopted here undermines a basic tenet of first amendment jurisprudence namely: that a work is obscene, if at all, by virtue of its entire content, not by virtue of some particular, isolated part. To permit, as here, a trial court to impose a procedure which precludes any possibility that disputed films can be judged in their entirety would be, in practical effect, to sanction a return to the days of *Regina* v. *Hicklin*, L.R. 3, Q.B. 360 (1868), when it was thought proper to judge obscenity by viewing only isolated excerpts of a work. To protect the vitality of the *Roth-Miller* approach and to assure that trial courts exercise utmost vigilance in assuring that trial procedures do not undermine the most basic principle of those seminal cases, the requested writ should issue.

Respectfully submitted,

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APPENDIX

APPENDIX

CONTENTS OF APPENDIX

As an aid to the Court, the contents of this Appendix are set forth as follows:

	Page
1. Order of the Supreme Court of Virginia Denying Writ of Certiorari to the Circuit Court of Fairfax County, April 27, 1981	2a
2. Judgment of the Circuit Court of Fairfax County, August 8, 1980	3a

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 27th day of April, 1981.

CROATAN BOOKS, INC.,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Record No. 801992

Circuit Court No. C-30933

From the Circuit Court of Fairfax County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

ALLEN L. LUCY
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

#30933

COMMONWEALTH OF VIRGINIA

vs.

CROATAN BOOKS, INC.

Indictment—Possession with intent to rent an obscene film (8 Counts)

This 8th day of August, 1980, came the Commonwealth, by her Attorney, and the Defendant, CROATAN BOOKS, INC. by its Counsel, Roger Zuckerman and Richard Stanley.

Thereupon, the Court Reporter was sworn.

This case came on this day on the Defendant's motion to set aside verdicts and for a new trial and for imposition of sentence.

Whereupon, the Court denied the Defendant's motion to set aside verdicts and for a new trial.

Whereupon, the Court imposed the following sentences:

Count I	Red Patterned Dress	$1,000.00 fine plus costs
Count III	Lip Love is Wet	$1,000.00 fine plus costs
Count IV	Around the World	$1,000.00 fine plus costs
Count V	Disco Lover	$1,000.00 fine plus costs
Count VII	Big Tease	$1,000.00 fine plus costs
Count VIII	Sensitive Asshole	$1,000.00 fine plus costs
Count IX	Sexy Plant Doctor	$1,000.00 fine plus costs
Count X	Anal Nymph	$1,000.00 fine plus costs

/s/ [Illegible]
Judge

[SEAL]

A COPY TESTE:
JAMES E. HOOFNAGLE
Clerk

By: /s/ Karen L. Marshall
Deputy Clerk